

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHULIE BURTON JONES,

Defendant-Appellant.

UNPUBLISHED

February 22, 2007

No. 264888

Wayne Circuit Court

LC No. 05-005005-01

Before: Sawyer, P.J., and Fitzgerald and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions of two counts of carjacking, MCL 750.529a; two counts of armed robbery, MCL 750.529; and one count of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to concurrent terms of twelve to twenty-five years' imprisonment for each of the carjacking and armed robbery convictions and to a consecutive mandatory term of two years' imprisonment for the felony-firearm conviction. We affirm defendant's convictions but remand the matter to the trial court for resentencing. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues he was denied the effective assistance of trial counsel because counsel failed to request a *Walker*¹ hearing before trial, failed to investigate the circumstances of defendant's alleged statement to the police, and failed to object to the prosecutor's delayed disclosure of defendant's signed confession and constitutional rights form.

Although defense counsel and the prosecution were provided with copies of the interrogation documents before trial, the documents did not appear to bear defendant's initials or signatures. Detroit Police Sergeant Julius Moses, who took defendant's statement, explained that the documents were signed in red ink, which did not copy well. On the day before trial, defense counsel was provided with legible copies of the documents that showed defendant's initials and signatures. On the first day of trial, counsel argued he was not aware that the forms were signed until the day before trial. Accordingly, counsel stated he would be required to put defendant on the stand to explain the statement. Therefore, counsel requested that the trial court prohibit the

¹ *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

prosecution from introducing defendant's prior conviction for the unlawful driving away of an automobile. The trial court denied counsel's motion.

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 326-327; 521 NW2d 797 (1994). The determination regarding whether counsel was ineffective is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To prevail on a claim of ineffective assistance of counsel, this Court applies the standard enunciated in *Strickland, supra*. Under this standard, a defendant must show (1) that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment, i.e., that his performance fell below an objective standard of reasonableness, and (2) that the deficient performance prejudiced the defense, i.e., that but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. *LeBlanc, supra* at 578; *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). The reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" *Strickland, supra* at 689. The defendant therefore must overcome the presumption that the challenged action might be considered sound trial strategy. *Strickland, supra* at 689; *LeBlanc, supra* at 578.

Defendant has failed to establish either that counsel's performance fell below an objective standard of reasonableness or that the allegedly deficient performance prejudiced the defense. Defendant has made no showing that, had a *Walker* hearing been held, his written confession would have been suppressed. Indeed, counsel presented all of the relevant facts concerning the confession to the trial court, and yet the court determined that relief was not warranted. Although defendant argues that counsel failed to investigate the circumstances surrounding the confession and failed to object to the delayed production of the signed confession, the record establishes otherwise. Counsel consistently argued that defendant had not signed the statement or the constitutional rights form, and counsel requested that defendant's prior conviction be suppressed as a remedy for the delay in production of the legibly signed statement. In his closing argument, counsel emphasized that the copies of the interrogation records that were provided to both the defense and the prosecution before trial did not contain signatures or initials, and that defendant testified he was never interviewed by Sergeant Moses.

Defendant has failed to establish that he was prejudiced in any way by counsel's failure to seek suppression of the statement on the ground that it was untimely produced or by his failure to request a continuance to adequately prepare for this "new" evidence. Counsel had been provided a copy of defendant's statement in advance of trial. Although the copy did not reveal defendant's initials or signature, counsel had a full day to prepare after receiving the legibly signed documents, and there has been no showing that counsel should have, or could have, employed any different strategy in demonstrating that the statement was not made. Furthermore, contrary to defendant's contention that counsel failed to present evidence that the signatures and initials on the interrogation documents were not defendant's, counsel *did* present such evidence: defendant's testimony that the signatures were not his. Moreover, defendant did not simply testify he did not sign or initial the written statement; rather, he testified he never even spoke with Officer Moses and did not make any statement at any time. Under these circumstances, whether the documents contained initials or signatures is simply irrelevant. Defendant has not

demonstrated either that suppression of the legibly signed statement was warranted or that he would have in any way benefited from an adjournment. Trial counsel is not ineffective for failing to make a futile motion or argument. *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002).

Finally, even had the interrogation documents been suppressed, there has been no showing that there is a reasonable probability that the outcome of trial would have been different. Evidence was presented that, at the time of his arrest, defendant was in possession of the victim's state identification card and the gun used in the carjacking. The victim immediately identified defendant in a police lineup, and she positively identified him at trial as her assailant. Although defendant claimed he never spoke with Moses and never gave a statement to the police, the statement presented at trial contained numerous details about defendant's personal life, which presumably could only have been supplied by defendant. In sum, defendant cannot establish that, absent his statement, the jury would not have found him guilty of the charged offenses.

Defendant next argues he is entitled to resentencing because the trial court sentenced him to a minimum sentence that exceeded the appropriate guidelines range, and that trial counsel was ineffective in reporting the improper sentencing range at sentencing. We agree that resentencing is warranted.

Issues concerning the proper application of the statutory guidelines are reviewed de novo. *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001). Resentencing is justified when there is an invalid sentence, such as one due to a misunderstanding of the law. *People v Mutchie*, 251 Mich App 273, 274-275; 650 NW2d 733 (2002), *aff'd* 468 Mich 50; 658 NW2d 154 (2003).

A trial court must impose a sentence within the guidelines range unless the court states on the record a "substantial and compelling" reason for a departure from the guidelines. MCL 769.34(2), (3). Thus, this Court reviews a trial court's sentencing decision "to determine, first, whether it is within the appropriate guidelines range and, second, if it is not, whether the trial court has articulated a 'substantial and compelling' reason for departing from such range." *People v Babcock*, 469 Mich 247, 256; 666 NW2d 231 (2003).

As the prosecution concedes, the trial court unwittingly sentenced defendant outside the proper guidelines range, and defendant is thus entitled to resentencing. The parties agree that defendant was properly assigned a prior record variable (PRV) score of 40, giving him a PRV Level of "D" under the 2005 sentencing guidelines. MCL 777.62. The parties also agree that defendant was properly assigned a total of 36 points for all offense variables (OVs), putting him in OV Level II. MCL 777.62. Defendant was not sentenced as a habitual offender. According to the sentencing grid, MCL 777.62, the appropriate guidelines range was therefore 81 to 135 months. However, defense counsel erroneously informed the trial court that the guidelines range was 81 to 202 months, which corresponds to the range for a third-time habitual offender. The prosecutor did not object or dispute the guidelines range.

The trial court exceeded the proper guidelines range when it imposed a minimum sentence of 144 months in reliance on an incorrect guidelines range of 81 to 202 months. The trial court did not articulate substantial and compelling reasons for a guidelines departure; indeed, the record reveals that the court did not intend to depart from the guidelines range. The

prosecution concedes the error and agrees that the maximum minimum sentence that may be imposed is 135 months. Accordingly, defendant is entitled to be resentenced.

Defendant's convictions are affirmed, but the matter is remanded for resentencing. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Pat M. Donofrio